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OPINION NUMBER 2005-2

DATE: August 2, 2005

SUBJECT: Disclosure of Vinson & Elkins Report

PREPARED BY: City Attorney

INTRODUCTION

At the August 1, 2005, session of the San Diego City Council, the City Council waived the attorney-client privilege with respect to the second report from Vinson & Elkins [V&E], the law firm retained by the City to investigate whether illegal acts were committed in relation to the City's financial practices and the underfunding of the San Diego City Employees' Retirement System. A copy of the report, which is stamped "confidential" and "draft" on every page, has been provided to the City Attorney.

QUESTION PRESENTED

Is the V&E Report a public record subject to disclosure under the Public Records Act?

SHORT ANSWER

Yes. In light not only of the ongoing investigations by the Securities and Exchange Commission and the United States Attorney's Office into the City's financial matters but also of the charges that the District Attorney has brought against certain pension board officials, the public interest in the disclosure of the V&E Report is very high. Such public interest is not outweighed by any interest that the City might have in not disclosing the report.

BACKGROUND

At the Monday, August 1, 2005, session of the San Diego City Council, City Manager Philip Lamont Ewell asked that the Council Members waive the attorney-client privilege as it relates to the second report from V&E, the law firm retained by the City to investigate whether

illegal acts were committed in relation to the City's financial practices and the underfunding of the San Diego City Employees' Retirement System. In addition the City Manager advised the Council that the V&E findings would be discussed with the U.S. Attorney, the Securities and Exchange Commission, and KPMG, the City's outside auditor.

Also requesting this waiver was accountant Troy Dahlberg from Kroll, Inc., who appeared before the Council on behalf of the City's outside audit committee, which had been established in response to alleged inadequacies in V&E's first report and which had been directed to review investigations into the City's fiscal crisis.

Under questioning by the City Attorney, Mr. Dahlberg reluctantly admitted that he possessed certain written findings and conclusions by V&E that comprise the firm's second report. Mr. Dahlberg's reluctance extended also to the production of a summary of this work. However, after further questioning by the City Attorney, Mr. Dahlberg agreed to produce the document, which he claimed was approximately 200 pages in length.

Upon requests by the City Attorney and Council Member Donna Frye, the matter of the Council's waiver of attorney-client privilege as it relates to the V&E report was continued to allow Mr. Dahlberg to retrieve the summary and present it to Council Members for their review. Accompanied by two assistant city attorneys and a representative from the City Manager's Office, Mr. Dahlberg left the Council Chambers and retreated to the audit committee's workplace, which is located in the City Manager's office.

Approximately 10 to 15 minutes later, the assistant city attorneys reappeared and informed the Council that Mr. Dahlberg was hesitating to release the report and that he apparently had called Lynn Turner, his Kroll colleague and head of the audit committee, V&E attorney Paul Maco, and City Manager Ewell, who had remained in the Council Chambers. The City Attorney instructed the assistant city attorneys to return to the audit committee's office and obtain the report.

Following a 5-to-10 minute recess, Deputy Mayor Toni Atkins reconvened the Council session, and shortly thereafter Mr. Dahlberg returned with a white binder containing the subject V&E conclusions. Subsequent to additional discussion, the Council determined that the V&E findings should be made available to Council Members and the City Attorney. However, no time frame was established for the availability to occur. Both Council Member Frye and the City Attorney objected, urging that the report be made available immediately.

After Council Member Scott Peters told Mr. Dahlberg that he need not accede to the City Attorney's request, the City Attorney repeated his demand that the report be produced without delay and that two assistant city attorneys accompany Mr. Dahlberg to the audit committee office while he copied the document. Mr. Dahlberg resisted but eventually returned to the audit

committee's office with the attorneys and the City Manager. Upon arrival, Mr. Dahlberg excused himself to retreat to a conference room, where he again telephoned Mr. Maco.

A lengthy conversation ensued, and Mr. Dahlberg then entered Mr. Ewell's office, followed by the assistant city attorneys. Mr. Dahlberg informed them that Mr. Maco, whom he had again telephoned, was reiterating his objections to releasing the document. After much acrimonious discussion, the City Manager told Mr. Dahlberg that it was the sense of the City Council that they have immediate access to the report. The City Manager also said that despite his reluctance to do so, he was supporting the City Attorney on this matter.

Mr. Dahlberg acquiesced to copying of the document after he had stamped "confidential" and "draft" on every page, per Mr. Maco's instructions. The copying was completed late Monday night.

ANALYSIS

On April 1, 2005, the City Attorney issued an opinion on the voters' passage of California State Proposition 59 and San Diego City Proposition D.¹ By amending the California State Constitution and the San Diego City Charter in the November 2, 2004, General Election, San Diegans are guaranteed "access to information concerning the conduct of the people's business." Cal. Const. art. 1, §3(b)(1); San Diego Charter § 216.1(b)(1). In this opinion the City Attorney concluded that, by passing these measures, San Diegans empowered themselves to demand greater access to writings and electronic records under the possession, custody, or control of their public officials, including writings in the possession of the Mayor, City Council, and other City officials. See Cal. Const. art. 1, §3(b)(1); San Diego Charter § 216.1(b)(1).

As the ultimate political decision makers, citizens have the right and the responsibility to become and remain informed about public issues so that they can "maintain control over the instruments [of government] that they have created." *Id.* Information about these instruments empowers citizens not only to vote intelligently but also to protect themselves from public corruption. The former goal is achieved through deliberation—a process by which citizens "seek relevant information, reflect on the issues, and exchange views with others." (Luskin, Robert C, and Fishkin, James S., *Deliberation and 'Better Citizens,'* Center for Advanced Study in the Behavioral Sciences, Stanford University).

As is well known, the City is under investigation by the U.S. Attorney's Office, the U.S. Securities & Exchange Commission, and the San Diego County District Attorney for violations of criminal and civil laws in connection with financial and political decisions made regarding the San Diego City Employees' Retirement System. In early 2004, the City retained V&E to assist in investigating financial disclosure practices, and on September 16, 2004, the firm released its first

¹ Op. City Att'y 05-1, (Apr. 1, 2005) is incorporated by reference herein.

report. In letters dated October 11, and October 29, 2004, KPMG, the City's outside auditor, rejected the V&E report because the scope and methodology used by V&E did not include an illegal acts investigation and was therefore insufficient under AU Section 317. In order to satisfy the concerns of KPMG, the City Council authorized an additional \$1.8 million payment to V&E to provide a more extensive report. It is this second report that was discussed at the August 1, 2005 City Council session.

The California Public Records Act defines a "public record" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252(e). Clearly, the V&E report contains information relating the conduct of the City's business. Accordingly, it is subject to disclosure unless exempted from disclosure under the Public Records Act.

Although Government Code section 6254(a) provides an exemption for "preliminary drafts" and the V&E Report is stamped "draft," we are advised that the draft is in sufficient form to be disclosed by City representatives to the Securities and Exchange Commission and the U.S. Attorney's Office in connection with the ongoing investigations. Section 6254(a) states that a "preliminary draft" may be withheld if it is: "not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure." Because the draft is being used and shared with other agencies, it will be necessary to retain the "draft" as a public record used by the agency. Further, it is clear from the matters addressed in the report that the public interest in disclosure is not outweighed by the fact that it is a draft. One of the rationales for not releasing drafts is that doing so might cause confusion in the public if findings are released prematurely or are subject to ongoing changes. In this case, the public interest is high in seeing the results of V&E's investigation, and V&E will have the opportunity to clarify or respond to any inquiries regarding any changes that are made in their final report, should one be issued.

Because the attorney-client privilege has been waived, the only other possible reasons for not disclosing the report would be under the balancing test of Government Code section 6255. That section requires the agency to balance the public interest in disclosure against the interest in non-disclosure. As discussed above, the California Constitution has been amended to guarantee that the people have the right of access to information concerning the conduct of the people's business and that the writings of public officials and agencies shall be open to public scrutiny. Cal. Const. art. 1, §3(b)(1). The supporters of Proposition 59 argued that if the government asks the public for funding, power, and trust, it should be as transparent as possible. Given the continuing and serious problems that the City faces, it is abundantly clear that the public has a right to know the findings by V&E and whether their tax dollars have been appropriately spent to further the public's interest.

CONCLUSION

The V&E report is clearly a public record subject to disclosure under the California Public Records Act. The report will be used in connection with discussions with the Securities and Exchange Commission and the U.S. Attorney's Office. The Council has waived the attorney-client privilege to allow such discussions and disclosures to occur. Accordingly, there is no applicable exemption under the Public Records Act that would justify withholding the report.

Respectfully submitted,

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City Attorney

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